IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JEYCOB ENGLAND **APPELLANT**

V. **NO. 2014-KA-00048-COA**

STATE OF MISSISSIPPI **APPELLEE**

MOTION FOR REHEARING

COMES NOW, Jeycob England, by and through counsel, pursuant to Rule 40 of the Mississippi Rules of Appellate Procedure (MRAP)**,** and moves this Court to grant rehearing of its decision handed down in this matter on January 12, 2016. In support thereof, England would respectfully show the following, to-wit:

England respectfully requests rehearing based on specific errors of law in which this opinion contains.

ISSUE

Dr. Mark LeVaughn's Testimony Violated England's Sixth Amendment Right to Confrontation. The Court's Affirmance of this Violation Directly Conflicts with the Holdings of the Federal District in Mississippi as well as the United State Supreme Court.

1. The Court misapplies the law in its holding that England's Sixth Amendment rights were not violated in this case. In its opinion, the Court agreed that Dr. LeVaughn's testimony regarding Ford's final autopsy results was admissible and not in violation of England's confrontation rights. The Court recognizes that since Dr. LeVaughn reviewed Dr. Shaker's preliminary report, along with other records and photographs, and authored his own report, his testimony did not violate the

Confrontation Clause.

2. The Court's holding is in direct conflict with the United State's Supreme Courts position on this matter. In *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2710 (2011), the Court was faced with the question of whether the Confrontation Clause permitted the prosecution's introduction of a forensic laboratory report, containing testimonial statements, through the in-court testimony of an analyst who did not sign the certification, personally perform the tests, or observe the performance of the test.

3. In *Bullcoming*, the Court rejected New Mexico's holding that surrogate testimony of an analyst was sufficient to satisfy the Confrontation Clause. *Id.* at 2714. New Mexico reasoned that the analyst who authored the report was merely a 'scrivener' who transcribed the results of a testing machine, in this case, the gas chromatograph machine. *Id*.

4. The Court held that analyst's certification "reported more than a machine-generated number". *Id*. In fact, the analyst's signature conveyed that he received the evidence intact, that the evidence corresponded with the forensic report number, and that he performed a particular test on the sample in evidence, and that he adhered to a precise protocol in doing so. *Id.* at 2714. " He further represented, by leaving the "[r]emarks" section of the report blank, that no "circumstances or condition. . . affect[ed] the integrity of the sample or . . . the validity of the analysis." *Id*. at 2714.

5. The Court reiterated that the analysts who write the reports that the State introduces into evidence must be made available to the defense for confrontation, "even if they possess the scientifc acumen of Mme. Curie and the veracity of Mother Theresa." *Id*. at 2715 (citing *Melendez - Diaz,* 557 U.S. at 319 n.6.). "The Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross examination." *Id.* at 2716.

6. Despite this clear and concise rule to confrontation, Justice Sotomayor raised several

questions in her concurring opinion in *Bullcoming*. Justice Sotomayor highlighted some factual circumstances that the case did not present. According to the Justice, *Bullcoming* was not a case "in which the person testifying is a supervisor, reviewer, or someone lese with a personal, albeit limited, connection to the scientific test at issue." *Id* at 2722.

7. Justice Sotomayor continued by saying, "it would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report of such results." *Id*. At 2722. She also distinguished the *Bullcoming* opinion as not being a case in which an expert was asked for his independent opinion about the underlying testimonial reports that were not admitted into evidence. *Id.* According to Justice Sotomayer, these unresolved questions explained the limited reach of the Court's opinion in *Bullcoming*. *Id* at 2719.

8. Despite Justice Sotomayer's insistence that *Bullcoming* did not address or answer any of the factual circumstances described above, Mississippi Courts have improperly taken her dicta as the guiding law of our state.

9. The Mississippi Supreme Court has held that surrogate testimony is permissible if the witness has "intimate knowledge" of the particular report, and if the person was "actively involved in the production" of the report at issue. *McGowen v. State,* 859 So.2d 320, 339-40 (¶68) (Miss. 2003). "We [the Court] require a witness to be knowledgeable about both the underlying analysis and the report itself to satisfy the protections of the Confrontation Clause." *Id.*

10. *McGowan* was decided pre-*Crawford* and the constitutionality of McGowan's holding was criticized by Justice Kennedy's dissenting opinion in *Melendez-Diaz*. In his dissent, the Justice wrote,

> " A fifth State, Mississippi, excuses the prosecution from producing the analyst who conducted the test, so long as it produces someone. Compare *Barnette v. State,* 481 So. 2d 788, 792 (Miss. 1985) (cited by the Court), with *McGowen v. State,* 859 So. 3d 320, 339-340 (Miss. 2003) (the Sixth Amendment does not require confrontation with the particular analyst who conducted the test). It is possible that neither Mississippi's practice nor the

burden-shifting statutes can be reconciled with the Court's holding."

Melendez- Diaz, 129 S. Ct. 2527 at 2558.

11. Despite this warning in *Melendez - Diaz*, the Mississippi Supreme Court has continued to proclaim that the Constitution allows a "supervisor, reviewer, or other analyst involved may testify in place of the primary analyst where the person was 'actively involved in the production of the report and had intimate knowledge of analyses even though [he or] she did not perform the tests first hand." *Grim v. State*, 102 So. 3d 1073, 1081 (¶23) (Miss. 2012).

12. In *Grim*'s direct appeal, he argued that his right to confrontation was violated because he did not have the opportunity to cross-examine the drug analyst who authored the forensic report that was admitted as evidence against him. *Grim v. State*, 102 So. 3d 1073, 1077-78 (¶11) (Miss. 2012).

13. Grim was indicted for selling cocaine and the jury heard the testimony of Eric Frazure, a forensic scientist with the Mississippi Crime Laboratory. *Id* at 1077 (¶¶7-8). Frazure testified about the crime lab's analysis of the substance admitted into evidence and, through Frazure, the State introduced the crime lab report that said the substance was cocaine. *Id*. at (¶8).

14. Frazure signed the report as the "technical reviewer", but another analyst, Gary Fernandez, actually signed the report as the case analyst. *Id*. Frazure did not participate in Fernandez's analysis or observe him testing the substance. *Id.* at (¶9). The Mississippi Supreme Court affirmed Grim's conviction, finding Grim's constitutional rights to confrontation were not violated by the use of the technical reviewer's testimony. *Id*. at 1081 (¶23).

15. Recently, however, the Federal Court has announced that Mississippi's approach to this confrontation issue is not line with "clearly established federal law." *Grim v. Epps,* No. 3:14CV134-DMB-DAS, 2015 WL 5883163, at 16 (D. Miss. October 8, 2015).

16. In granting Grim's writ for habeaus corpus, the District court adopted the magistrate's finding below,

> When the prosecution introduces a forensic laboratory report into evidence, *Bullcoming* clearly establishes that the criminal defendant has a right to confront the analyst who performed the underlying analyses. In affirming his conviction, the Supreme Court of Mississippi held that petitioner's Sixth Amendment right to confrontation was satisfied because the substitute witness, Frazure, "had intimate knowledge about the underlying analysis and the report prepared by the [analyst who actually performed the analysis]." The issue presented is whether the Supreme Court of Mississippi "arriv[ed] at a conclusion opposite to that reached by the United States Supreme Court on a question of law." Because *Bullcoming* requires more than a mere familiarity with the underlying analyses and laboratory procedures, the state court decision [in *Grim v. State*] is "contrary to" clearly established federal law."

Grim v. Epps, No. 3:14CV134-DMB-DAS, 2015 WL 5883163, at *16 (D. Miss. October 8, 2015) (internal citations omitted).

17. The Court took notice that three facts were indisputable in Grim's case: (1) the forensic laboratory report, which contained Fernandez's findings of his analysis of the substance was admitted into evidence, (2) the forensic lab report was "testimonial" evidence, and (3) Fernandez did not testify at trial. *Id.* The Court determined that "no fair-minded jurist can conclude that petitioner's case falls outside of *Bullcoming's* doctrinal reach. *Id*. at *17.

18. This Court is required to adopt the same holding in England's case. Much like the forensic examiner in *Grim*, Dr. LeVaughn did not author the preliminary autopsy report. His opinion was based, in part, on the work performed by Dr. Skaker. England had the right to confront Dr. Skaker about his findings. This was in direct violation of England' right to confrontation.

CONCLUSION

England respectfully submits that the foregoing arguments warrant the grant of this Motion for Rehearing and requests that this Court withdraw its original opinion, handed down January 12, 2016, and substitute a new opinion, reversing England's sentence and remanding his case to the trial court for a new trial.

WHEREFORE, PREMISES CONSIDERED, England respectfully requests that the Court grant this Motion for Rehearing.

Respectfully submitted,

JEYCOB ENGLAND, APPELLANT

BY: /s/ Erin E. Pridgen

Erin E. Pridgen, Appellant Counsel

CERTIFICATE OF SERVICE

I, Erin E. Pridgen, Counsel for Jeycob England, do hereby certify that on this day I electronically filed the forgoing **MOTION FOR REHEARING** with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Honorable Jason L. Davis
Attorney General Office
Post Office Box 220
Jackson, MS 39205-0220

Further, I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above to the following non- MEC participants:

Jeycob England, MDOC #187944
Walnut Grove Youth Correctional Facility
Post Office Box 389
Walnut Grove, MS 39189

This the 5th day of February, 2016.

BY: /s/ Erin E. Pridgen
Erin E. Pridgen, Appellant Counsel

Erin E. Pridgen, MS Bar No. 102352
INDIGENT APPEALS DIVISION
OFFICE OF STATE PUBLIC DEFENDER
Post Office Box 3510
Jackson, Mississippi 39207-3510
Telephone: 601-576-4290
Fax: 601-576-4205
Email: eprid@ospd.ms.gov